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MANUAL OF MINIMUM STANDARDS
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TABLE OF CONTENTS

MINIMUM STANDARDS	Page
1. Standards of Practice (Generally)	1
2. Effect of Minimum Standards	1
3. Interest of Client	1
4. Establishment of a Relationship of Trust and Confidence with Clients	1
5. Establishment of Lawyer-Client Relationship	2
6. Prohibited Activities	2
A. Referrals	2
B. Gifts, Loans, or Temporary Transfers from Clients	3
C. Underwriting Bailbonds or Loans	3
D. Private Practice	3
7. Conflicts of Interest	3
A. Presumptive Conflicts	3
(1) Multiple Defendants	3
(2) Defendants in Cases Where Public Defender Represents Percipient Witnesses	3
(3) Defendants in Cases Where Employee of the Public Defender's Office Is Victim or Witness	4
(4) Defendants Who Have Actions against the Public Defender	4
B. Possible Conflicts	4
(1) Previous Representation of a Witness against a Defendant	4
(2) Writs and Appeals Where Competence of Counsel May Be an Issue	4
(3) Other Situations	5
8. Procedures for Conflicts of Interest	5

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A. Attorney's Determination (Presumptive Conflicts) 5
B. Attorney's Determination (Possible Conflicts) 5
C. Nondisclosure of Basis of Conflict 5
D. Court Orders Contrary to Declaration of Conflict 5
E. Duty To Determine Conflicts and Avoid Unnecessary Conflicts 6
F. Documentation of Conflicts 6

9. Control and Direction of Litigation 7

A. Advising Defendant 7
B. Control of the Case 7

(1) Decisions of Defendant 7
(2) Decisions of Counsel 7
(3) Consultation and Disagreement 8

C. Guilty Plea When Client Denies Guilt 8

10. Duty To Conduct Factual and Legal Investigation As Early As Possible 8

11. Duty To File Necessary Pretrial Motions or To Take Any Legal Action Necessary 9

A. Duty 9
B. Standard 9

12. Lack of Preparation before Trial and Failure To Comply with Deadlines 9

A. Failure To Comply with Deadlines 9
B. Failure To Be Ready for Trial 10
C. Duty To Inform Court and Opposing Counsel 10

13. Dispositions without Trial 11

A. Client's Consent Re: Plea Negotiations 11
B. Keeping Client Informed 11
C. Prevalent Practice 11
D. Plea of Guilty Only after Full Investigation and Analysis of Case 11
E. Diversion 11

3 1223 06801 3243

F. Certification of Pleas of Guilty, etc., to Superior Court 12

(1) Pleas of Guilty 12

14. Trial Practice 12

A. Jury Selection 12
B. Examination of Witnesses 12
C. Discovery 12
D. Investigation 12
E. Strategic and Tactical Decision Making 12
F. Decorum 13
G. Adverse Rulings 13

(1) Requests for Reconsideration 13
(2) Preservation of the Record 13

(a) Duty to object generally 13
(b) Attorney duty to object clearly and specifically 14
(c) Objection during opening or closing statements 14
(d) Insistence on a ruling 14
(e) Contemporaneous ruling 14
(f) Conditional admission of evidence 15
(g) Offers of proof 15
(h) Conferences and instructions 15
(i) Instructions 16

H. Instructions 16

I. Presentation of Argument 16

15. Post-Trial Motions 17

16. Sentencing 17

17. Appellate Responsibilities 17

A. Advice to Clients 17
B. Felony Case: Notice of Appeal 18
C. Misdemeanor Case: Notice of Appeal 18
D. No Appeals Where Incompetence at Issue 18

18. Cooperation with Counsel of a Former Client 18

19. Incompetence of Counsel 19

A. Definition 19
B. Duty of Lawyer 19
C. Incompetence by Other Attorney 19
D. Incompetence by Attorney Who Handled Earlier Phase 19
E. Strategic and Tactical Choices Not Incompetent Representation 20

20. Hearings Other than Trial 20

A. Preliminary Hearings 20
B. Arraignments 21

(1) General 21
(2) Move for O.R. for Misdemeanor Defendants . 21
(3) Walter's Motions 21
(4) Felony Cases 21

C. Pretrials 21

(1) Purpose 21
(2) Need for Preparation 21
(3) Care in Disclosure of Client's Case 22
(4) Dignity of Clients 22
(5) Heavy-Handed Treatment of Clients 22

D. Motions To Revoke Probation 22
E. Extradition Proceedings 23

(1) Effective Representation in Extradition Cases 23
(2) Duty To Ascertain Client's Wish 23
(3) Duty To Investigate 23
(4) Duty To Advise Client 24
(5) Bail 24
(6) Resisting Extradition 24

21. Mental Disability of Client 25

A. Duty To Ascertain 25
B. Evaluation of Legal Ramifications 25
C. Defenses 26
D. Incompetence To Stand Trial 26

(1) Duty To Inform Client 26
(2) Decision of Client 26
(3) Informing the Court 27

E. Constitutional Rights 27
F. Disagreement with Client 27
G. Conflict of Interest 27

22. Cases Involving Aliens 28

A. Duty To Ascertain 28
B. Care in Communicating 28
C. Cases Involving Exclusion 28
D. Alien's Other Lawyer 28
E. Conviction 29

(1) Advise Client 29
(2) Secure Court Recommendation against Deportation 29

23. Ex Parte Bail/O.R. Motions 29

MINIMUM STANDARDS

1. Standards of Practice (Generally)

   The attorneys of the Office of the Public Defender are obligated to provide representation in accordance with the standards set forth in this Manual, by the American Bar Association, by the decision of courts, and by ethical rules of the legal profession.

2. Effect of Minimum Standards

   The effect of the minimum standards herein is equivalent to a departmental regulation.

3. Interest of Client

   The duty of the attorney is to represent the legitimate interests of the client to the best of his/her ability; and considerations of personal, political, or professional advantages should not influence his/her advice or performance.

4. Establishment of a Relationship of Trust and Confidence with Clients

   A good relationship with clients is of utmost importance, and nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. It is, therefore, that all clients be treated with respect.

   Although certainly not exhaustive, the following responsibilities are part of the process of establishing the desired attorney-client relationship.

   A. Each attorney shall make every effort to meet, as soon as possible, with his/her client.

   B. Telephone messages from clients and from persons concerned with clients should be returned promptly.

   C. Attorneys should make diligent efforts to obtain release of an arrestee who may become a client.

   D. Clients must be informed of all developments in the case.

E. Disclosures by clients must be confidential.

F. Provide clients with advice which discloses fully and honestly all possible alternatives in terms of decisions and strategies.

G. Attempt to be as prepared as possible.

H. Disparaging remarks about clients should not be made, and comments contrary to the client's interest or repudiation should not be advanced.

5. Establishment of Lawyer-Client Relationship

A. The lawyer should explain the necessity of full disclosure of all facts known to the client for an effective defense, and the lawyer should explain the obligation of confidentiality which makes privileged the accused's disclosures relating to the case.

B. The conduct of the defense of a criminal case requires trained professional skill and judgment; therefore, the technical and professional decisions must rest with the lawyer without impinging on the right of the client to make ultimate decisions on certain specified matters as set forth herein.

C. It is essential that communications between lawyer and client remain confidential; and, therefore, each attorney of this office must make every effort to speak to his/her client in a place conducive to private discussion.

D. All documents relating to the case in the possession of the attorney shall be provided to the client or former client upon request. Correspondence from client and former clients must be answered.

6. Prohibited Activities

A. Referrals

The attorneys of this office shall not refer cases on a regular basis to any particular lawyer in private practice, or any bail bondsman, nor shall

an attorney of this office receive compensation for any suggestion to a defendant about the desirability of any attorney in private practice or any bondsman.

B. Gifts, Loans, or Temporary Transfers from Clients

The attorneys of this office shall not accept any fee, gift, loan from any client, nor shall the attorney accept any client's property, whether on a temporary or permanent basis, for his/her personal purposes.

C. Underwriting Bailbonds or Loans

No attorney of this office shall underwrite the bond of any defendant, or the loan of any client.

D. Private Practice

Private practice of law by the attorneys of this office is prohibited.

7. Conflicts of Interest

The Public Defender, and every deputy public defender, owes an undivided loyalty to each of the clients of this office. Any fact that mitigates that allegiance represents a basis for conflict of interest. If that conflict of interest would detract from a forceful representation, this office must disqualify itself at earliest opportunity.

A. Presumptive Conflicts

There are certain situations in which conflict of interest will be conclusively presumed.

(1) Multiple Defendants

This office cannot represent defendants charged jointly or charged separately for same crime or as a part of the same of series of charges.

(2) Defendants in Cases Where Public Defender Represents Percipient Witness

A conflict should be declared when the Public Defender represents a client who, in all

substantial likelihood, may be called as a witness in a criminal case where the Public Defender would otherwise be appointed.

(3) Defendants in Cases Where Employee of the Public Defender's Office Is Victim or Witness

A conflict should be declared when the victim or a potential witness is an employee of the Public Defender's Office or is a member of the immediate family of an employee.

(4) Defendants Who Have Actions against the Public Defender

A conflict should be declared in any case where the defendant has filed a claim, complaint, or appeal alleging ineffective counsel against the Office of the Public Defender.

B. Possible Conflicts

(1) Previous Representation of a Witness against a Defendant

In cases where a probable witness against an indigent defendant has been a client of the Public Defender, a conflict of interest may be declared depending on:

(a) whether the Public Defender's Office has possession of privileged material or information which could be used to impeach the credibility of the former client;

(b) whether the client is currently on probation, and whether that probation is to the court or to the probation department;

(c) whether the former representation was recent or not recent.

(2) Writs and Appeals Where Competence of Counsel May Be an Issue

A conflict of interest should be declared in an appellate-type proceedings (including

motions to dismiss pursuant to Section 995 P.C.) where the ineffectiveness of counsel may arise as a colorable issue.

(3) Other Situations

The previously-enumerated grounds for declaring a conflict of interest are not exclusive. There are other reasons that may exist; and if they arise, this should be treated in accordance with the procedures set forth herein.

8. Procedures for Conflicts of Interest

A. Attorney's Determination (Presumptive Conflicts)

In situations described in Section 7(A) [Presumptive Conflicts], the attorney has the responsibility to determine that such a conflict exists and shall indicate that fact to the court at earliest opportunity.

B. Attorney's Determination (Possible Conflicts)

In situations described in Section 7(B) [Possible Conflicts], the attorney has the responsibility to determine the possible existence of the conflict, to consult with his/her supervisor; and on the basis of that consultation, indicate promptly to the court the necessity of the Public Defender's disqualification if that is appropriate.

C. Nondisclosure of Basis of Conflict

When a conflict of interest is declared, no attorney shall reveal the basis of the conflict of interest if such revelation would violate attorney-client confidentiality.

D. Court Orders Contrary to Declaration of Conflict

In the event the court overrules an attorney's assertion of a conflict of interest, the attorney shall immediately consult with his/her supervisor, or with the Chief Attorney, or with the Public Defender.

E. Duty To Determine Conflicts and Avoid Unnecessary Conflicts

Conflicts are often ascertained late in the process of representation. This may necessitate a withdrawal from a case providing the basis of the conflict, as well as the new case. The Public Defender is under a duty to ascertain promptly the existence of any conflict that may be created by the representation of a new client.

(1) Every arraignment deputy who receives a police report indicating multiple suspects must determine the status of other suspects prior to accepting representation of the defendant.

> [Example: A, B, C, and D are charged with burglary. PD determines that A is a client in another court. Thus, PD will represent A].

(2) Every defendant prior to arraignment must be asked whether he/she has a pending case and if so, the status of that case prior to the Public Defender's acceptance of representation in the instant case.

> [Example: B is arraigned on May 2. The police report indicates that A, B, and C were arrested on April 30. PD then inquires whether PD is representing any of the codefendants. He determines that PD is representing A in the Superior Court and will appear on May 3. Thus, a conflict of interest should be declared, and advance notice should be given as to A, who will be appearing the next day].

F. Documentation of Conflicts

After a declaration of conflict is determined to be the appropriate course, the attorney shall

indicate confidentially in writing to Chief Attorney the name of client, the court, and the basis for the conflict. There shall be no other disclosure of such information.

9. Control and Direction of Litigation

A. Advising Defendant

(1) After informing himself/herself fully on the facts and law, the attorney should advise the client with complete candor concerning all aspects of the case;

(2) The attorney should not understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his/her plea.

(3) The attorney should caution the client about communications with the police or prosecution, with potential witnesses, except with the approval of the attorney, and with jurors or prospective jurors; and caution the client to avoid the reality or the appearance of any improper activity.

B. Control of the Case

Decisions relating to the conduct of the case are ultimately for the defendant, and others are ultimately for the defense counsel.

(1) Decisions of Defendant

(a) What plea to enter
(b) Whether to waive a jury
(c) Whether to testify
(d) Waiver of speedy-trial issues

(2) Decisions of Counsel

(a) What jurors to accept
(b) Pretrial and trial motions
(c) Tactical and strategic decisions pursuant to trial

(3) Consultation and Disagreement

Although the attorney has the prerogative to decide certain issues [see, supra, 9B(2)], the attorney should consult with client before making such decisions. Should disagreement occur, the attorney should make a private record of circumstances, the advice and the reasons, and conclusion reached. A public record of a disagreement is disfavored and should be made in exceptional circumstances (see, part 21F) where there is no abrogation of lawyer-client confidentiality.

C. Guilty Plea When Client Denies Guilt

If the client discloses to the lawyer facts which negate guilt, and investigation by the attorney supports that disclosure, and if, nevertheless, a client insists on entering a plea of guilty, the attorney may not properly participate in presenting a guilty plea without disclosure to the court.

10. Duty To Conduct Factual and Legal Investigation As Early As Possible

A. A primary duty of lawyers in this office is to conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that the lawyer may make informed decisions on the client's behalf. The following specific standards are designed as minimum guidelines for conducting the desired factual and legal investigations:

(1) Interview in depth all clients as early as possible [a specific date for the interview should be set up when the attorney first meets the client; the client should not simply be told to call the office to make an appointment].

(2) Research all applicable case authority.

(3) Contact possible witnesses provided by defendant and investigate possible defenses.

(4) Review all police reports, medical reports, etc.

(5) Order immediate psychiatric examination of client if diminished capacity or insanity defense may be indicated.

(6) Investigate factual, legal, and constitutional basis of alleged prior conviction.

(7) Conduct necessary investigation, including contacting expert witnesses.

(8) Conduct pretrial discovery.

(9) Conduct an independent examination of pretrial discovery evidence (e.g., paraffin testing, blood-alcohol analysis, etc.).

(10) Interview prosecution witnesses.

B. The duty to investigate exists regardless of defendant's admissions or statements of facts constituting guilt or of his/her desire to enter a guilty plea.

11. Duty To File Necessary Pretrial Motions or To Take Any Legal Action Necessary

A. Duty

Every attorney has an obligation to file the necessary pretrial or trial motions that would further the client's interests. Although the attorney may not be convinced that the pretrial motion will be successful, if there is a colorable basis for its claimed relief, if it provides tactical or strategic advantage, or if it establishes a basis for appellate record and litigation, the motion should be filed.

B. Standard

In preparing a pretrial motion, the attorney should exhibit professional skill in written and oral argument.

12. Lack of Preparation before Trial and Failure To Comply with Deadlines

A. Failure To Comply with Deadlines

In the event the attorney has not submitted, for whatever reason, the necessary pretrial or trial

motion within the time required by the court, the attorney shall so indicate that fact to the court and to the prosecution without delay. The attorney shall seek a further extension. If the court shall deny such extension, the attorney shall indicate -

(1) the reason for the failure;

(2) the basis of the motion;

(3) the ability to file the motion within a reasonable period of time;

and the attorney shall submit the motion as soon thereafter as possible as a court exhibit.

B. Failure To Be Ready for Trial

No attorney shall attempt to conduct a trial for which he/she is not prepared. In the event that the court orders an attorney to trial before he/she has adequate preparation, the attorney shall indicate on the record his/her failure to be ready, his/her reason for not being ready, and his/her requirement of more time.

Should the attorney, nevertheless, be ordered to trial, the attorney has two options:

(1) to refuse to go to trial, or

(2) to be present at trial but refuse to examine jurors, witnesses, or to make argument.

The decision as to which option shall be utilized will be made after consultation with attorney's supervisor and the Chief Attorney or the Public Defender.

C. Duty To Inform Court and Opposing Counsel

The attorney has a duty to inform opposing counsel and the court of any need for an extension of time to prepare motions or to prepare for trial.

13. Dispositions without Trial

A. Client's Consent Re: Plea Negotiations

If possible, the attorney should secure his/her client's consent before engaging in plea discussions with the prosecutor. If this is not possible, the attorney at least should explain to the client the plea-bargain format before offering him/her the proferred "deal."

B. Keeping Client Informed

The attorney should keep the client informed of all developments in the plea-negotiation process.

C. Prevalent Practice

The attorney should keep himself/herself informed of the prevailing plea-bargaining practices. When an attorney realizes he/she lacks adequate information or knowledge about the value of a case, a senior attorney should be consulted before entering any plea.

D. Plea of Guilty Only after Full Investigation and Analysis of Case

No attorney shall participate in the entry of a plea of guilty by a client, unless the attorney is of the opinion that he/she has had an opportunity to adequately interview the client, investigate the factual circumstances of the case, and assess its legal merits.

Pleas of guilty at the time of the defendant's arraignment are disfavored.

E. Diversion

Whenever the nature and circumstances of the case permit, an attorney should explore the possibility of an early diversion of the case from the criminal process through the use of diversion projects and community agencies.

F. Certification of Pleas of Guilty, etc., to Superior Court

(1) Pleas of Guilty

No attorney shall enter a plea of guilty to a felony charge in the Municipal Court without consultation and consent by the Head Trial Attorney of the Municipal Court Felony Section, or the Head Trial Attorney for the Superior Court, or, in their absences, of the Chief Attorney.

14. Trial Practice

Each attorney has a duty to prepare adequately and fully for all stages of a trial. This includes, but is not limited to:

A. Jury Selection

The attorney should raise any appropriate issue concerning the method of selection of the jury and exercise of peremptory and for-cause challenges.

B. Examination of Witnesses

The proper examination and cross-examination of trial witnesses require the full preparation by the attorney, including a knowledge of discovery, of investigative material, of any previous testimony by that witness.

C. Discovery

The attorney must receive and review all available information and materials within the control of the police and the prosecution.

D. Investigation

An attorney conducting a trial must conduct investigation, independently of prosecution discovery, of all possible factual matters related to the case.

E. Strategic and Tactical Decision Making

Before a trial commences, an attorney must outline strategic plans for the conduct of the defense, as

well as prepare for as many tactical opportunities as possible.

F. Decorum

As a professional advocate, the attorney in trial should conduct himself/herself in a manner that brings respect to himself/herself to the Office of the Public Defender, the legal profession, and the client.

The attorney must, at all times, be the zealous advocate of the client and should do nothing to derogate the client in the eyes of the jurors, the public, the judge, or the prosecutor.

G. Adverse Rulings

(1) Requests for Reconsideration

The attorney, as an officer of the court, has the duty to comply promptly with all directives of the court within the jurisdiction of the court. However, the attorney has the right, and sometimes the duty, to make respectful requests for reconsideration of adverse rulings.

(2) Preservation of the Record

An appellate court can review a case to the extent permitted by the trial record. The trial may have been filled with reversible error; but if the error is not in the clerk or the reporter's transcripts, the appellate court will be helpless to act.

(a) Duty to object generally

For that reason, the trial attorney has an obligation, whether anticipating the possibility of being appellate counsel or not, to ensure everything of significance that occurs during any portion of the trial court proceedings (pretrial motion, trial, sentencing) be entered as fully and as accurately as possible in the record.

(b) Attorney duty to object clearly and specifically

A trial attorney must object clearly to any questionable events before, during, and after trial.

A trial attorney must describe the particular ruling, offered evidence, conduct, or comment to which he/she takes exception and state specifically the legal basis for his/her objection.

(c) Objection during opening or closing statements

Defense counsel should not hesitate to object to prosecutorial misconduct during opening or closing statements to the jury. Counsel should object, move to strike the comment, ask for an admonition to the jury to ignore the comment, and, perhaps, move for a mistrial.

(d) Insistence on a ruling

Merely making an objection does not end the trial attorney's duty. The trial attorney must be sure that the court makes a ruling on the objection and that the record reflects it. If the trial judge has not made a ruling, counsel should ask for one. If the court refuses to comply, counsel should object to the failure or refusal to rule. If a ruling is given, it should be clear and unambiguous in response to a clear and concise objection.

(e) Contemporaneous ruling

A trial counsel should insist on a prompt, rather than a delay, ruling on his/her objection. Although the court may order a variation on the order of proof or ask for a specific order out of the jury's presence, the trial attorney

must insist on a definitive ruling on any pending objection which is reflected on the record.

(f) Conditional admission of evidence

When an objection has been interposed too late to present the jury from seeing or hearing evidence, or when evidence has been conditionally admitted and is subject to a motion to strike, counsel should move to strike at the earliest opportunity; and request should be made to have the jury disregard the evidence.

(g) Offers of proof

If an attorney has evidence to present, but the court rules it inadmissible, the attorney must make an offer of proof outside the jury's presence in order to preserve the issue for appeal.

This can be done in a number of ways:

(i) statement by counsel of what proferred evidence will show and how it is relevant to defense thereon;

(ii) examination of witnesses under oath to give proferred evidence;

(iii) affidavit of proferred evidence which is incorporated into the record.

(h) Conferences and instructions

The motions and requests made by an attorney in chambers or in off-the-record conferences should be placed on the record as soon as it is feasible to do so. The decision made in chambers or in conference should similarly be recorded.

(i) Instructions

Instructions that are requested by the defense must be properly numbered, and a written theory setting forth the theory in support thereof should be made where appropriate.

When an instruction is refused, the attorney must insist that the record reflects that fact and also take care that the record reflects what the instruction stated.

H. Instructions

Attorneys should not solely rely on CALJIC instructions and should, whenever possible, attempt to formulate instructions which are geared to the specific facts of the case.

It is the better practice for attorneys to prepare instructions before the beginning of trial, and it is good practice for the attorney in the development of a factual and legal defense to begin by analyzing possible instructions.

I. Presentation of Argument

Despite the fact that closing argument represents one aspect of the total trial process, it is a most important aspect. During closing argument, more so than at any other time of trial, an attorney is placed in the role of an advocate in the truest sense of the word.

The attorney's argument should clearly set forth the points the attorney seeks to communicate to the jury.

Despite the state of evidence, the attorney must never give hint of hopelessness of the client's case, of the attorney's difficulty in defending the client, or the attorney's personal difficulty with the client. It must be a positive statement of client's cause.

15. Post-Trial Motions

The attorney's responsibility includes presenting appropriate motions, after verdict and before sentence, to protect the client's rights. This may include:

A. a motion for a new trial,

B. a motion notwithstanding verdict,

C. a motion in arrest of judgment.

Any defect in the trial process (e.g., actions of jurors, perjury, newly-discovered evidence) must be brought to the attention of the court in the form of one of the above motions or in some equivalent motion without delay.

16. Sentencing

A. The attorney for the defendant should be familiar with the sentencing alternatives available to the court and attempt to learn its current practices in exercising sentencing discretion. The consequences of various dispositions should be explained fully to the client, and his/her opinion should be consulted as to the best and most desirable alternative.

B. Whatever sentence the defendant faces, he/she should be informed of the exact sentence faced.

C. Prior to the sentencing hearing, the attorney should have read the probation officer's report. Any questionable material should be verified, and the attorney should be prepared to supplement or challenge that report if necessary.

D. At a sentencing hearing, the attorney's duty is to present such evidence and documentation, as is necessary, to enhance the client's legal and personal position.

17. Appellate Responsibilities

A. Advice to Clients

In the event of a conviction, the attorney, whether in a felony or misdemeanor case, should

advise the client of his/her right to appeal the judgment of conviction. The attorney should also give to the client the attorney's professional judgment as to whether there are meritorious grounds for appeal and an indication of the probable results of an appeal.

B. Felony Case: Notice of Appeal

In the case of every felony conviction after a court or jury trial, the attorney shall file a Notice of Appeal in the Superior Court for the client.

C. Misdemeanor Case: Notice of Appeal

In the case of every misdemeanor conviction after a court or jury trial, the attorney shall advise the client of his/her right to appeal, of his/her right to counsel on appeal, and of the requirement that a Notice of Appeal must be filed within 30 days of judgment. If the client indicates a desire to appeal in a misdemeanor case, the attorney shall file a Notice of Appeal. If this Notice of Appeal is filed, the attorney shall consult with his/her supervisor as to the issues that could be colorably raised on appeal; and if there is any colorable basis to contend that trial counsel was ineffective, the supervisor shall promptly advise the Appellate Department of the Superior Court, in writing, indicating the existence of a conflict of interest. The supervisor shall advise the Misdemeanor Appeal Section of the San Francisco Bar Association of his/her action, the name, and action number.

D. No Appeals Where Incompetence at Issue

No attorney of this office shall participate in any appeal where the question of effective counsel exists as a colorable issue.

18. Cooperation with Counsel of a Former Client

Cooperation is required of an attorney with counsel of a former client and with counsel on appeal.

In the event of an assertion of incompetence of counsel, the attorney whose conduct is questioned should answer inquiries by appellate counsel in a truthful and cooperative manner. Correspondence with any party, including the prosecutions (whether in the form of the Attorney General or the District Attorney), the appellate counsel, or the court must be approved by the Chief Attorney or the Public Defender.

19. Incompetence of Counsel

A. Definition

Incompetence of counsel is defined as the failure by counsel to raise a material defense, either through failure to investigate, lack of legal knowledge, or through lack of assertiveness.

B. Duty of Lawyer

An attorney who is of an opinion that he/she has failed to raise a material defense, and has thereby prejudiced the client's interest, is under a duty to inform his/her supervisor and/or the Chief Attorney. If the supervisor or the Chief Attorney concurs that there is incompetence of counsel, the client must be advised promptly. Appropriate steps must also be undertaken after consultation with the client about existing remedies.

C. Incompetence by Other Attorney

In the event that an attorney believes that another attorney of this office has been ineffective or incompetent, that attorney should inform his/her supervisor and/or the Chief Attorney without delay.

D. Incompetence by Attorney Who Handled Earlier Phase

If an attorney, after investigation, is satisfied that another attorney who served in an earlier phase did not provide effective assistance, he/she should not hesitate to seek relief for the defendant on that ground.

E. Strategic and Tactical Choices Not Incompetent Representation

An attorney may deliberately waive a defense or an objection in order to further some tactical or strategic purpose in the client's interest; in order to preclude a subsequent claim of incompetent representation in such a case, he/she should make a memorandum to the trial file, setting forth the reasons for the decision. The memorandum should indicate that client has been informed of the decision and concurs.

20. Hearings Other than Trial

A. Preliminary Hearings

An attorney representing a client in a preliminary hearing must vigorously pursue his/her client's interests. Accordingly, the attorney must interview the client immediately after receiving the case, must undertake an investigation that will enable him/her to conduct a searching cross-examination, and must research all points of law, raised by the facts of the case. In the course of the preliminary hearing, the attorney must consider:

(1) the possibility of preventing the establishment of a corpus delicti;

(2) the possibility of weakening the prosecution's case, so as to prevent a holding;

(3) the reduction of the offense to a misdemeanor;

(4) the need for discovery of the prosecution's case through the deposing of witnesses;

(5) the use of appropriate evidentiary objections and search-and-seizure defenses;

(6) the use of defense testimony (although this is generally disfavored);

(7) the impact of preliminary hearing evidence on parole or probation status.

B. Arraignments

(1) General

At the arraignment, the attorney will review all eligibility documents, indicate to the court whether the Public Defender's Office is appointed, and if so, STAND (as opposed to set) beside the client and undertake the representation of the client.

(2) Move for O.R. for Misdemeanor Defendants

The attorney in all misdemeanor cases shall move for a release on the defendant's own recognizance and if this is impossible, for a reduction in bail. (See Van Atta v. Scott [1980]; AB2 [1978 statutes].)

(3) Walter's Motions

In every case where a client is in custody, the attorney shall examine the police report to see whether the police report states a public offense, and if it does not, to move the court for the client's release on his/her own recognizance pursuant to In re Walter's.

(4) Felony Cases

In felony cases, where the defendant is in custody, the attorney should consider the criterion for release on O.R. set forth in Van Atta v. Scott (1980) 27 Cal.3d 424.

C. Pretrials

(1) Purpose

The purpose of the pretrial is to discuss the immediate future of the case with the judge and with opposing counsel. Plea negotiation may be conducted, consistent with Standards herein.

(2) Need for Preparation

It is essential that in pretrial, the attorney has an adequate grasp of the case in order to

intelligently discuss it. It is also essential that investigation be conducted and that discovery be current.

(3) Care in Disclosure of Client's Case

Care must be taken not to disclose prematurely the client's case. The attorney must use his/her judgment as to the advisability of discussing the client's explanation, the debilities in the prosecution's case, and other factors that may be of later tactical and strategic importance.

(4) Dignity of Clients

Although the client may have personal difficulties and personally-difficult qualities, it is important that in the informality of the pretrial setting, the attorney upholds the client's personal dignity and the attorney refrains from derogation of the client.

(5) Heavy-Handed Treatment of Client

At pretrial, when plea negotiations are being conducted, it is imperative that the client be treated courteously, that discussions between the lawyer and client be conducted in a setting as conducive to confidentiality and candor, and that attorney refrains from heavy-handed attempts to encourage the client to plead guilty.

D. Motions To Revoke Probation

Motions to revoke probation are the most powerful prosecutorial device available. No other factor contributes to pleas of guilty to new charge involving long-term jail or imprisonment than this single pleading. As a consequence, attorneys for the defense often capitulate and allow the prosecution to dictate the terms of plea bargaining in a new, related case.

It is essential, then, that an attorney whose client faces a motion to revoke (whether simultaneous to a new charge or not) be steadfast in his/her advocacy. Therefore, at the motion to revoke:

(1) the attorney should move to delay a hearing on the motion to revoke until after the completion of any new charge;

(2) the attorney should object to the introduction of hearsay evidence, and if the court is disposed to allow admissibility of hearsay evidence, to insist on a hearing on the reliability of hearsay evidence and a finding of good cause for the unavailability of witnesses whose declarations are the subject of proferred, hearsay evidence.

(3) the attorney should object to the use of preliminary hearing testimony in related cases not merely on hearsay grounds but also on grounds that there was a different "motive and interest" in the examination of witnesses at the preliminary hearing;

(4) the attorney should consider the presentation of an affirmative defense which does not prejudice the tactical or strategic possibilities in a trial on a new, related matter.

E. Extradition Proceedings

(1) Effective Representation in Extradition Cases

In every case where a defendant is accused of being a fugitive from justice in another state, the attorney has the duty to provide effective representation to that client.

(2) Duty To Ascertain Client's Wish

The attorney should ascertain whether the client wishes to return to the jurisdiction demanding his/her extradition.

(3) Duty To Investigate

The attorney should ascertain whether the defendant is:

(a) the person charged in the complaint or a fugitive from justice;

(b) whether the person was in the jurisdiction at the time alleged for the commission of the offense;

(c) whether there are circumstances that would favor his staying in this state (e.g., defendant wanted on a trivial charge, defendant has substantial contacts in state, defendant would suffer cruel or inhumane punishment; etc.).

(4) Duty To Advise Client

The attorney should speak candidly with the client explaining the unlikelihood of resisting extradition, the adverse effect of resisting extradition on future bail and sentencing, the fact that the jurisdiction does give credit for time served in resisting extradition.

(5) Bail

The attorney should also attempt to secure a lowered bail if defendant does not wish to waive extradition.

(6) Resisting Extradition

In the event the defendant insists on resisting extradition, the attorney should, without delay, notify the Governor's extradition secretary by phone or in writing and, at some time, send the extradition secretary a detailed explanation as to why the extradition request should not be honored.

The legal grounds for resisting extradition are as follows:

(a) the request for extradition is not attested to and does not state an offense in the demanding jurisdiction.

(b) the person detained is not the person sought in the demanding jurisdiction.

(c) the person will be subjected to cruel and unusual punishment.

(d) the person was not in the jurisdiction at the time of the offense.

The attorney should bring the legal grounds to the attention of the Governor and, if necessary, to the attention of the courts by way of a writ of habeas corpus.

The attorney should bring equitable grounds to the attention of the Governor's Office.

The attorney should also explore the possibility of persuading the demanding jurisdiction to drop the request, drop the charges or, in the case of parolees and probationers, of moving their supervision to this jurisdiction.

The attorney should be aware that the extradition law may change and that a new, uniform Extradition and Rendition Act is before the Legislature.

21. Mental Disability of Client

A. Duty To Ascertain

The attorney has a duty to ascertain whether the client suffers from any mental disability, such as mental illness, developmental disability, learning disability, or other mental condition which might affect his defense.

Such conditions might include psychoses, neuroses, mental retardation, epilepsy, autism, cerebral palsy, or dyslexia.

The attorney should seek the assistance of an expert when necessary in making this determination.

B. Evaluation of Legal Ramifications

Once the attorney has determined that the client suffers from some mental or developmental disability, he/she should evaluate the legal ramifications including whether -

(1) it provides a defense;

(2) alternatives to criminal prosecution are available (e.g., diversion of a mentally-retarded person, civil conservatorship, or involuntary or voluntary hospitalization, or remedial or rehabilitative programs);

(3) it renders the client incompetent to stand trial.

C. Defenses

The attorney shall discuss any defenses relying upon mental or other disability with the client. The client must be informed of the consequences of the defense (e.g., possible hospitalization or involuntary treatment, stigma before the defense is adopted).

D. Incompetence To Stand Trial

(1) Duty To Inform Client

Should the attorney determine that the client does not understand the nature of the proceeding or cannot cooperate in his/her defense, the attorney shall inform the client of his/her opinion and shall explain the provisions of Section 1368, et seq. to the client.

(2) Decision of Client

Before informing the court of the problem and before interposing incompetency proceedings, the matter must be referred to the attorney's supervisor. In deciding whether to go forward with Section 1368 proceedings, it must be remembered that the attorney's primary concern must be the presentation of the best possible legal defense. The client's best interest in the therapeutic sense should not be the determining factor in selecting alternative courses of conduct in the criminal case, especially, when the client opposes therapeutic intervention.

(3) Informing the Court

If the client disagrees with the attorney's determination and the client's condition continues to render him/her incapable of standing trial, the attorney has a duty to inform the court of the problem. Before so informing the court, it may be advisable to encourage and to seek treatment for the client which may ameliorate the condition, provided that the treatment is consented to by the client.

E. Constitutional Rights

The attorney must be vigilant in protecting the client's constitutional and statutory rights when he/she is unable to do so himself/herself.

The decision to waive constitutional rights in the course of any proceeding is one to be made by the client.

F. Disagreement with Client

When the client and attorney disagree about the most desirable course of action, and the client is or has been found to be legally competent to stand trial, the attorney has a duty, nevertheless, to provide the client with a vigorous defense even when the disagreement is a matter of record.

G. Conflict of Interest

The attorney must be alert to possible inter-office conflicts of interest (e.g., the client seeks release from confinement and is represented by the Office of the Public Defender in both criminal and civil proceedings, or the Office of the Public Defender represents a family member in juvenile court). The attorney shall discuss the possible conflict with his/her supervisor and with the attorney in the other public defender section representing the client.

22. Cases Involving Aliens

A. Duty To Ascertain

The attorney has a duty to ascertain whether a defendant is, in fact, an alien; the attorney must determine what the impact of the case may have on his/her immigration status in this country.

B. Care in Communicating

The attorney, in communicating with an alien, must be sure that the alien can understand what the attorney is saying. If necessary, the attorney will use competent and confidential interpreters that will convey the attorney's words in a clear, understandable form.

The attorney has a duty to advise the client of the impact the criminal case has on his/her immigration status.

C. Cases Involving Exclusion

Aliens having cases of moral turpitude, of sex offenses, of great seriousness, and aliens who have previous criminal records require special care. If there is any possibility that a conviction on a diversion will result in exclusion from this country, the matter should be referred to the Head Trial Attorney. The Head Trial Attorney has the duty to see that legal questions regarding this case are answered and that the case can be handled by the attorney given the attorney's experience level and given the consequences of a conviction.

D. Alien's Other Lawyer

If the alien is represented in a matter before the federal courts or before the Immigration and Naturalization Service, the deputy public defenders should apprise the attorney in the immigration proceedings of all developments and confer from time to time with that attorney before taking any action in the criminal case.

E. Conviction

(1) Advise Client

The client must be aware of the impact a conviction has on his/her immigration status before pleading guilty or before going to trial.

(2) Secure Court Recommendation against Deportation

If the alien-client is convicted of any crime, the attorney should attempt to secure a recommendation against deportation by the court (such a motion must be served on I.N.S.).

If plea negotiations contemplate a plea of guilty by the aliens, the attorney should attempt to secure the court's recommendation against deportation as an essential element of any plea bargain.

23. Ex Parte Bail/O.R. Motions

Before an arraignment, an attorney is authorized to request a bail setting or a release on arrestee's promise to reappear. Such request can be made ex parte. However, it is better practice when requesting a bail setting or an O.R. release to have a representative of the prosecution present.

If an O.R. or bail request is made ex parte, the attorney should be careful to bring to the magistrate's attention any fact which the attorney believes would have a bearing on the magistrate's decision to grant the requested bail or an O.R. The attorney, of course, must be an advocate on behalf of the arrestee; but care must be taken not to exploit the ex parte contact with the magistrate. Additionally, the attorney, by appearing on behalf of an arrestee, is vouchsafing for the arrestee's reliability to return to court. Therefore, the attorney in ex parte request must act with extreme circumspection.

JB:ctp
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